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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 65779-s76M BY BARBARA L. SOWERS)

FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 12, 1988 Proposal for Decision, and incorporates them herein by reference.

CLARIFICATION: The Applicant is hereby restricted to divert 6 gpm from the groundwater source, since this is the flow rate at which water infiltrates the Applicant's sump. However, the Applicant may appropriate water at a higher rate, such as 35 gpm, from the water stored in the sump.

WHEREFORE, based upon the record herein, the Department makes the following:

CASE #

ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 65779-s76M is hereby granted to Barbara L. Sowers to divert 6 gpm up to 1 acre-foot from January 1 through December 31, inclusive of each year, for domestic use, and .5 acre-feet from April 15 through October 15, inclusive of each year, for lawn and garden irrigation, from waste and seepage waters.

The point of diversion for this Permit is a 12' sump located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 15 North, Range 22 West, Missoula County, Montana. The priority date for this Permit shall be 11:30 A.M., June 5, 1987. The place of use is the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 15 North, Range 22 West, Missoula County, Montana.


This Permit is subject to the following express terms, considerations, restrictions, and limitations:


A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. If a written complaint is received by the Department alleging that the Applicant's diversion is adversely affecting a prior water right, the Department may conduct a field investigation of the project. If the Department finds sufficient evidence supporting the allegation, it may conduct a hearing to allow the Applicant to show cause why the Permit should not be modified or revoked. The Department may modify or revoke the Permit to protect prior water rights or it may allow the Permit to continue unchanged if it is determined that no prior water rights are being adversely affected.

Done this 8 day of December, 1988.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E 6th Ave.
Helena, MT 59620-2301
(406) 444-6605


Silvio Rodriguez, Hearing Examiner
Department of Natural Resources
and Conservation
PO Box 438
Lewistown, MT 59457
(406) 538-7459

CASE #

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 24th day of January, 1989, as follows:

Barbara Sowers
P.O. Box 68
Huson, MT 59846

Phyllis J. Mether-Ballard
6 Mile Rd. Box 216
Huson, MT 59846

Thomas J. Grapensteter
380 Conifer Dr.
Huson, MT 59846

Arthur J. Scheffer, Jr.
P.O. Box 1552
Belgrade, MT 59714

Allin & Carol Hodge
RR 6 Mile Rd, Box 315
Huson, MT 59846

Dean & Elsie Parker
6 Mile Rd.
Huson, MT 59846

Chris & Jeannie Siegler
Box 385 Conifer Dr.
Huson, MT 59846

Dorothy Ann Durdon
Conifer Dr. Box 375
Huson, MT 59846

Frances S. Dusenbury
Dorothy M. Grapensteter
380 Conifer Dr.
Huson, MT 59846

Randy Hennes
390 Conifer Dr.
Huson, MT 59846

Frank & Kim Stracener
Star Route Box 275
Huson, MT 59846

Mike McLane
Missoula Field Manager
P.O. Box 5004
Missoula, MT 59806
(Inter-departmental)

Sam Rodriguez
Lewistown Field Manager
204 So. Daws
Lewistown, MT 59457
(Inter-departmental)


Sally Martinez
Secretary

CASE #

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 65779-S76M BY BARBARA L. SOWERS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 31, 1988, in Missoula, Montana. The record was closed at the conclusion of this hearing.

APPEARANCES

Applicant Barbara L. Sowers (hereafter, "Applicant" or "Applicant Sowers") appeared pro se.

Mike McLane, Manager of the Missoula Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

No objectors appeared at the hearing, either in person or by representation.

EXHIBITS

Applicant Sowers submitted six exhibits for inclusion in the record in this matter. All of the Applicant's exhibits were admitted for inclusion in the record in this matter, without objection.

Applicant's Exhibit 1 is a hand drawn columnar section of the Applicant's test hole excavation illustrating the soils profile from ground level to a 12 feet depth.

Applicant's Exhibit 2 is a 3" x 5", 35mm color print showing the excavated test hole with water standing at the bottom. This photo was taken in late Nov. or Dec. 1986.

Applicant's Exhibit 3 is a polaroid photo taken on August 31, 1988, showing the test hole with a measuring tape in the middle.

Applicant's Exhibit 4 is a polaroid photo taken on August 31, 1988, showing the dry condition of the closest water channel to the Applicant's proposed project.

Applicant's Exhibit 5 is a polaroid photo taken on August 31, 1988, showing the excavated test hole and the closest water channel to the sump.

Applicant's Exhibit 6 is a copy of a geologic map which includes the area where the applicant's proposed project will be located.

The Department staff expert witness offered two exhibits for inclusion in the record, and they were both admitted without objection.

Department's Exhibit 1 is a copy of an aerial photograph that shows the area where the applicant's proposed project is located.

Department's Exhibit 2 is a mylar overlay to Department's Exhibit 1, that shows the location of the Applicant's proposed project in relation to the various streams and ditches in the area.

FINDINGS OF FACT

1. MCA, Section 85-2-302 (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in MCA Section 85-2-306 (1987), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." This Applicant has not made application for appropriation of waters as described under MCA Section 85-2-306 (1987). Therefore, MCA Section 85-2-302 applies in this matter.

2. The application in the matter was regularly filed with the Department on June 5, 1987, at 11:30 AM.

3. The pertinent portions of the application were published in the Missoulian, a newspaper of general circulation in the area of the source, on September 9, 1987.

4. Applicant Sowers seeks a permit to divert waste and seepage waters by means of a 12' deep sump and pump to be located in the NW 1/4 NE 1/4 SE 1/4 of Section 11, Township 15 North, Range 22 West, Missoula County, Montana, at a rate of 35 gallons per minute (gpm) up to 1 acre foot (AF) of water per year for domestic purposes and up to .5 AF of water per year for lawn and garden irrigation. The requested period of appropriation for domestic use is January 1 to December 31, inclusive of each year, and for lawn and garden irrigation is April 15 to October 15, inclusive of each year.

5. The use proposed in the Application in this matter was originally filed as a groundwater project, which required filing a

Notice of Completion of Groundwater Development, Form. No. 602. After conducting a field inspection of the project area, on May 28, 1987, the Department determined that the source for this project is waste and seepage water, which would ultimately contribute and/or is part of the flow of an unnamed tributary of the West Fork of Six Mile Creek. In response to this determination by the Department, the Applicant filed the application in this matter. (Information from file)

At the time of the field inspection by the Department, May 28, 1987, the level of the water in the test hole was high. Also, the unnamed tributary to which the waters in the test hole may contribute to or is part of, was flowing water. However, the waters in the unnamed tributary disappeared into the ground and did not reach the West Fork of Six Mile Creek. (Applicant's testimony)

6. A total of 15 objections were filed in the Application in this matter. None of the Objectors appeared at the hearing in person or through a representative. The following Objectors withdrew their objections based on a condition agreed to by themselves and the Applicant:

Ed and Chris Scheffer
Dennis W. and Patricia L. Scheffer
William R. Sayles
Jack O. Shuck
Robin Bourne and Gary and Daniel Hall
O. Gordon and Juanita M. Hirachi
Arthur Joseph Scheffer Jr.

The Condition agreed upon by Applicant and above Objectors is as follows:

"If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If, during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected."

The following Objectors did not withdraw their objections to this application in this matter, but did not appear at the hearing:

Phyllis J. Mether-Ballard
Dorothy Ann Durdon
Chris and Jeannie Siegler
Frances S. Dusenberry and Dorothy M. Grapensteter
Dean L. and Elsie M. Parker
Randy D. Hennes
Frank and Kim Stracener
Allin and Carol Hodge

7. Applicant Sowers proposes to withdraw the water from a sump using a pump with a maximum withdrawal rate of 35 gpm. However, the Applicant estimated the flow rate available at the test hole at 6 gpm. This estimate was made by calculating the time it took for the water

to fill a known area after the test hole had been pumped dry.

(Applicant's testimony)

8. Applicant Sowers testified that the test hole was dug in November 1986. Since this test hole was dug it has never gone dry. During this time the depth of the water in the test hole has varied from a minimum depth of 1 foot to a maximum depth of 12 feet. The Applicant testified that February and March are historically the driest period for shallow wells in the area. During February and March 1987, the Applicant's test hole maintained approximately 24 inches of water.

9. Applicant Sowers has been using water from the test hole at a rate of 40 to 50 gallons per day. This use of water did not visibly affect Walt Wilson's well, which is located approximately 600 to 800 feet downstream, during the historical low water period of February and March, 1987. (Applicant's testimony)

10. Applicant Sowers testified that the sump, when finished, will be 12 feet in diameter and 12 feet deep. The project includes the installation of two perforated concrete rings. Each ring is 6 feet in diameter and 3 feet in height. These rings will be stacked (one on top of the other) and placed at the bottom of the sump. On top of the perforated concrete rings two solid concrete rings of the same size will be placed. A concrete well cap will be placed on the top concrete ring, and a pump house will be built covering the rings.

The excavated area around the 6' diameter rings will be backfilled with washed gravel up to a 6 feet depth. At this point

plastic will be laid to form an impermeable barrier. The 6' between the plastic and the ground surface will be backfilled with clay and gravel.

11. A review of the Department's records did not disclose any planned uses or developments for which a permit has been issued or for which water has been reserved.

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant, substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must, as provided in Section 85-2-311 (1), MCA, issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The following Objectors of record did not appear at the hearing either in person or through a representative. Therefore, these Objectors are found in default, and their objections are hereby dismissed. (See A.R.M. 36.12.208.)

Phyllis J. Methers-Ballard
Dorothy Ann Durdon
Chris and Jeannie Siegler
Frances S. Dusenberry and Dorothy M. Grapensteter
Dean L. and Elsie M. Parker
Randy D. Hennes
Frank and Kim Stracener
Allin and Carol Hodge

However, the Applicant shall not be relieved of the duty to present evidence to satisfy her substantive burden of proof when all objectors to a proceeding default. (See A.R.M. 36.12.208.)

5. The proposed uses of water for domestic and lawn and garden irrigation, are beneficial uses of water. (See MCA 85-2-102 (2) and also Finding of Fact 4.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 10.)

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 11.)

8. There are unappropriated waters available in the amount the Applicant seeks to appropriate at times when water can be put to the use proposed by the Applicant and throughout the period during which the Applicant seeks to appropriate. (See Finding of Fact 11.)

The Applicant seeks to appropriate waste and seepage waters at a rate of 35 gpm. However, tests conducted by the Applicant have determined that water infiltrates the test hole at a rate no greater than 6 gpm. (See Finding of Fact No. 7.)

Therefore since water is not available to the Applicant at the requested rate, but it is available at a rate of up to 6 gpm, the Hearing Examiner concludes that the application must be limited to a flow rate of 6 gpm. (See MCA Section 85-2-312 (1).) Limiting the flow rate to 6 gpm allows the permit criterion of 85-2-311 (a) (ii) to be met.

9. The record provides substantial credible evidence that the water rights of prior appropriators will not be adversely affected. (See Finding of Facts 5 and 9.)

10. Applicant Sowers and Objectors Ed and Chris Scheffer, Dennis W. and Patricia L. Scheffer, William R. Sayles, Jack O. Shuck, Robin Bourne, Gary and Daniel Hall, O. Gordon and Juanita Hirschi, and Arthur Joseph Scheffer Jr., mutually agreed in writing upon a

condition to be placed on the Permit which clarifies the Department's procedure in the event that one of the Objectors alleges adverse impact to their water rights. (See Finding of Fact 6.)

The Department may issue a permit subject to terms, conditions, restrictions, and limitations which are necessary to satisfy the criteria of Section 85-2-311. (See MCA Section 85-2-311.)

The Hearing Examiner concludes that the mutually agreed upon condition is binding upon the Applicant and clarifies the Department's role in the event of an adverse impact allegation based on the Applicant's use of water. Therefore, said condition is made part of the Proposed Order in this matter.

11. Since the source of water for the application in this matter is waste and seepage waters from upstream irrigation, the Applicant is not entitled to have the source continued in the event that the initial user ceases to waste or to allow the water to seep from his present system.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 65779-76M is hereby granted to Barbara L. Sowers to appropriate 6 gpm up to 1 AF for domestic use, for the period of use of January 1 to December 31 inclusive of each year, and .5 AF for lawn and garden irrigation for the period of use of April 15 to October 15, inclusive of each year.

The water will be pumped from a 12 foot deep by 6 feet in diameter sump, located in the NW 1/4 NE 1/4 SE 1/4 of Section 11, Township 15 North, Range 22 West, Missoula County, Montana. The priority date for this Permit is June 5, 1987, at 11:30 AM.

The Permit in this matter is issued subject to the following expressed terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. If a written complaint is received by the Department alleging that the Applicant's diversion is adversely affecting a prior water right, the Department may conduct a field investigation of the project. If the Department finds sufficient evidence supporting the allegation, it may conduct a hearing to allow the Applicant to show cause why the Permit should not be modified or revoked. The Department may modify or revoke the Permit to protect prior water rights or it may allow the Permit to continue unchanged if it is determined that no prior water rights are being adversely affected.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (P.O. Box 438, Lewistown, MT 59457); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.


Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources

Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA 2-4-621 (1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral arguments are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 12 day of October, 1988.



Silvio Rodriguez, Hearing Examiner
Department of Natural Resources
and Conservation
PO Box 438
Lewistown, MT 59457
(406) 538-7459

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served upon all parties of record at their address or addresses this 19th day of October, 1988, as follows:

Barbara Sowers
P.O. Box 68
Huson, MT 59846

Dean and Elsie Parker
6 Mile Road
Huson, MT 59846

Phyllis J. Mether-Ballard
6 Mile Road, Box 216
Huson, MT 59846

Dorothy Ann Durdon
Conifer Drive, Box 375
Huson, MT 59846

Chris and Jeannie Siegler
Box 385, Conifer Drive
Huson, MT 59846

Frances S. Dusenbury
Dorothy M. Grapensteter
380 Conifer Drive
Huson, MT 59846

Thomas J. Grapensteter
380 Conifer Drive
Huson, MT 59846

Randy D. Hennes
390 Conifer Drive
Huson, MT 59846


Arthur Joseph Scheffer, Jr.
P.O. Box 1552
Belgrade, MT 59714

Frank and Kim Stracener
Star Route, Box 275
Huston, MT 59846

Allin and Carol Hodge
RR 6 Mile Road, Box 315
Huson, MT 59846

Sam Rodriguez
Hearing Examiner
Lewistown, MT 59457

Mike McLane
Missoula Field Manager
P.O. Box 5004
Missoula, MT 59806


Irene V. LaBare
Legal Secretary

CASE #